APPELLATE HIGHLIGHTS

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SUPREME COURT CIVIL MATTERS

County Recorder May Invalidate Nomination Petition Signatures for Reasons Other Than Those Alleged by Challenger. In light of the policy underlying A.R.S. § 16-351(A) and its legislative history, a County Recorder, in reviewing challenged nomination petition signatures, may invalidate signatures for legitimate reasons other than those specifically alleged in the challenger's complaint. *Lubin v. Thomas*, CV 06-0321-AP/EL, 10/24/06.

Notice of Claim Served Upon One Member of the Board of Supervisors Is Not Sufficient to Sue the County. When suing a public entity, A.R.S. § 12-821.01 requires a plaintiff to file a notice of claim on a person authorized to accept service for the public entity. Persons authorized to accept service for counties include "the chief executive officer, the secretary, clerk or recording officer thereof." Although the Board of Supervisors is the "chief executive officer" of the county, service upon one Board member does not qualify as service on the "chief executive officer." *Falcon v. Maricopa County*, CV 06-0106-PR, 10/26/06.

SUPREME COURT CRIMINAL MATTERS

Although a criminal defendant is generally precluded from raising ineffective assistance of counsel that was not raised in an earlier petition for postconviction relief, **a criminal defendant is not precluded pursuant to Rule 32.2, ARIZ.R.CRIM.P., from raising an ineffective assistance of appellate counsel claim in a second Rule 32 Petition in which prior appellate counsel and Rule 32 counsel were the same person** because Arizona law has consistently held that it is improper for an attorney to argue their own ineffectiveness as the objectivity of a different attorney is required in such circumstances. **Both a colorable claim for ineffective assistance of counsel exists and an evidentiary hearing is required where appellate counsel fails to properly argue on appeal the sufficiency of causation evidence** related to a felony murder conviction derived from child abuse. Under Arizona law a colorable claim "is one, that if the allegations are true, might have changed the outcome." While there is a strong presumption that appellate counsel provided effective assistance, appellate counsel is responsible for reviewing the record and selecting the most promising issues to raise on appeal, and a defendant may overcome the presumption of effectiveness where such counsel ignores issues that are clearly stronger than those selected for appeal. *State v. Bennet*, CR 05-0533-PR, 11/9/06.

Death qualification of a jury is constitutional even though the particular jury may originally have been impaneled for only the guilt phase of a capital trial and a later jury would determine the actual sentence. **A trial court does not err in admitting photographs of murder victims during the guilt, aggravation and penalty phases even when a criminal defendant does not deny that the murders took place, yet merely claims that he is not the perpetrator. Moreover, although a photo of a victim fetus is unsettling, it is both relevant and properly admitted to prove the elements of a fetal manslaughter offense, as well as the multiple homicides aggravator.** Even if a defendant does not contest certain issues, photographs are still admissible if relevant because the burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense. Although photographs must not be introduced "for the sole purpose of inflaming the jury," such photographs of the deceased victim(s) are relevant in such cases because not only are the fact and cause of death always relevant in homicide prosecutions, yet photographic evidence may also be relevant to prove other issues, such as: (1) corpus delecti, (2) the identification of the victim(s), (3) to show the fatal injury, (4) to determine the atrociousness of the crime, (5) to corroborate State witnesses or the State's theory of the case, and (6) to illustrate testimony. **The fetal manslaughter statute as codified under A.R.S. § 13-1103(A)(5) does not apply only in cases in which a fetus dies, yet the mother lives** because the statute was plainly intended by the legislature to protect the life of the fetus and applies when the acts and mental state of the defendant would support a murder charge in the event the mother died. **The retroactive application of Arizona death penalty statutes amended after *Ring II* to defendants who are entitled to a jury determination after their original judge imposed death sentence was set aside is not unconstitutional** under the Ex Post Facto Clauses of the federal and state constitutions, and such application does not violate the principles of double jeopardy. Under this statutory scheme, it is unnecessary for probable cause as to each capital aggravator alleged to have been found to exist, and there is no prejudice to a defendant post *Ring II* who receives adequate notice of aggravating circumstances prior to the aggravation/penalty phase. Moreover, although completing a defendant's trial with the same judge or jurors is ideal, a defendant has no absolute right to have a guilt phase jury also determine his sentencing, and may only be prejudiced if he is able to identify on appeal any evidence that would have been helpful to the aggravation/penalty jury and that they were unable to present such evidence to that jury. **Though a defendant sentenced to death was previously entitled under Arizona law to an independent review of the jury's findings of aggravation and mitigation and the propriety of the death sentence, the new standard of review of death sentences under A.R.S. § 13-703.05(A) is the abuse of discretion standard.** However, if an alleged capital homicide occurred before Aug. 1, 2002, the effective date of the new sentencing scheme, the lower standard does not apply.

A trial court's instructions concerning the A.R.S. § 13-703(F)(6) "especially heinous, cruel or depraved" aggravator previously found facially vague by the U.S. Supreme Court in *Walton v. Arizona* without the use of additional explanatory constructions by the Arizona Supreme Court with the basic instruction itself constitutes error in capital cases.

Preclusion of mental health expert testimony for mitigation purposes is appropriate when the Defendant refuses to be interviewed by the State's expert. Pursuant to A.R.S. § 13-703(C) & (D), the rules of evidence do not apply to the presentation of mitigation in the penalty phase of a capital trial whereby both the prosecution and defense may present any information relevant to any of the mitigating circumstances presented with the only limitation being that such evidence must be relevant to the issue of mitigation and comport with due process such that a capital defendant must have the ability to confront testimonial statements reasonably expected to be used prosecutorially or to receive notice of any hearsay statements to be introduced by the State in rebuttal to mitigation, having an opportunity to either explain or deny the statements. Although prior bad acts testimony may be presented in the penalty phase, **trial courts should exclude prior bad acts evidence that is either irrelevant to the thrust of the defendant's mitigation or otherwise unfairly prejudicial.** While A.R.S. § 13-703(C) requires a capital defendant to prove mitigating circumstances by a preponderance of the evidence, neither the State nor the defendant has the burden of proving that the mitiga-

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tion is sufficiently substantial to call for leniency such that the issue is left to entirely to the jury. Pursuant to both the U.S. Supreme Court's holding in *Payne v. Tennessee* and Arizona law a jury may consider a victim's impact statement to rebut a defendant's mitigation evidence as long as the statement is not so unduly prejudicial as to render the trial fundamentally unfair. *State v. Hampton*, CR 03-0033-AP, 8/15/06.

In analyzing the propriety of a lower court's denial of a *Batson* challenge involving an alleged racially motivated peremptory strike of a prospective juror, appellate review of a trial court's decision regarding the State's motives for the strike is for clear error. In such cases, the defendant bears the burden of proving purposeful discrimination. **After establishing a prima facie case of discrimination, the striking party must provide race or gender-neutral reasons for the strike itself, and reversal is not appropriate unless the reasons provided by the State are clearly pretextual, with antipathy toward police expressed by a venire person constituting a valid reason to strike** when the State's case relies on police testimony. In capital cases, while a judge may exclude for cause any juror who would never vote for the death penalty, exclusion of those who could set aside either conscientious or religious scruples against the infliction of the death penalty is error**.** However, **a judge may exclude a prospective juror whose promises to apply the law are contrary to their comments and demeanor on voir dire.** Although in criminal cases any private communication, contact or tampering (directly or indirectly) with a juror during trial about any pending trial matter is presumptively prejudicial, **a judge does not err in refusing to replace a juror approached by the media where an appropriate investigation includes testimony of both the juror and media representative establishing that the contact was de minimus** (i.e.. the juror was not even aware of the movie producer's profession after receiving the producer's card and putting it in his pocket) **and that the juror remained fair and impartial.**

The purpose of the Arizona criminal disclosure rules is to facilitate the search for truth by "giv[ing] full notification of each side's case-in-chief so as to avoid unnecessary delay and surprise at trial." As such, **Rule 15.1(a)(3), ARIZ.R.CRIM.P., which requires production of an expert's proposed testimony including their "written report or statement," also requires disclosure of any examination or test results or related opinions of the expert even if they are not written down, yet are known to the State.** Although Rule 15.7, ARIZ.R.CRIM.P., provides several sanctions a trial court may impose for noncompliance with the discovery rules, including the "granting of a continuance" or "[p]recluding a party from calling a witness, offering evidence or raising a defense not disclosed," it should seek to apply sanctions that affect the evidence at trial and the merits of a particular case as little as possible. When a party objecting on disclosure grounds categorically rejects a trial court's attempts to resolve a discovery dispute, it is impossible on appeal to assess any prejudice suffered. **A trial court does not err in admitting prior conviction or prior bad acts evidence when a defendant's insanity is at issue so long as the evidence is relevant to disprove the asserted defense and is not unduly prejudicial.** Nor does it err by failing to instruct a jury that a defendant's mental illness may negate the element of mens rea. While the first prong of the *M'Naghten* test states that an individual suffering from a mental disease or defect may not know the nature and quality of their act, Arizona's statutory definition of insanity only includes the second prong of that test concerning whether a defendant knew the alleged criminal act was actually wrong. Although the Arizona Constitution prohibits a judge from commenting on the evidence by expressing an opinion as to what the evidence proves or interfering with a jury's independent evaluation of the evidence by suggesting that a witness' testimony is unreliable, **a trial court does not err by merely commenting on the legal basis for striking a portion of a witness' testimony on evidentiary grounds.** The Sixth Amendment Confrontation Clause is not violated by the admission of non-confronted statements that fall within the state of mind exception to the hearsay rule and are not submitted for the truth of the matter asserted by the declarant because they are not testimonial in nature.

A trial court does not err in dismissing an alleged prior serious offense aggravator under A.R.S. § 13-702(F)(2) where the alleged offense occurred in another state and that state's definition of the subject offense did not constitute a serious offense under Arizona law. While a criminal defendant during the penalty phase of a capital trial has the preponderant burden to prove the existence of mitigating circumstances for consideration by the jury in its determination of either a life or death sentence, the mitigation evidence need not have a nexus with the crime itself. **Recommendations by either a victim or a defendant's family member as to an appropriate sentence in a capital case are properly excluded at trial** because they are not constitutionally relevant**. A defendant's equal protection rights are not violated by the State consulting with a representative government or ethnic group concerning whether to seek the death penalty in a particular case.** The State has wide discretion in deciding whether to seek the death penalty in a particular case and may do so under A.R.S. § 13-703 if it can prove beyond a reasonable doubt that the defendant committed first-degree murder and can prove at least one aggravating factor. **In reviewing the propriety of the imposition of the death penalty in a particular case, substantial mitigating evidence balanced against a single statutory aggravating factor may raise serious questions about whether a death sentence is warranted.** Although mitigating evidence need not bear a nexus to a capital crime, the relationship between the mitigating evidence and the murder itself may affect the weight given to the mitigating evidence such as in the case where a defendant establishes in mitigation both mental deficiency and mental illness which contributed to the commission of the crime itself. *State v. Roque*, CR 03-0355-AP, 8/14/06.

COURT OF APPEALS CIVIL MATTERS

The Probation Department Is Not Liable for Shooting Caused by Individual on Probation. The Probation Department is not liable for failing properly to supervise or arrest an individual on probation who shot and killed another individual. Even if the Department's breach of duty in fact caused the death, proximate cause requires a "natural and continuous sequence, unbroken by any efficient intervening cause." The exercise of probation officer's statutorily authorized discretion to bring probationers into court would be derogated if the exercise of such discretion was ruled a proximate cause of a subsequent tort. *Hamblin v. State*, 1 CA-CV 05-0059, 9/26/2006.

A.R.S. § 48-805 Authorizes a Fire District to Impose a Facilities Benefit Assessment on Homes Not Yet Constructed. A.R.S. § 48-805, which explicitly authorizes fire districts to adopt resolutions imposing, among other things, "facilities benefit assessments," allows a fire district to impose a "facilities benefit assessment" on homes for which a building permit has issued but which have not yet been constructed. Such an assessment is not an improper tax under the standards set forth in *May v. McNally*, 203 Ariz. 425, ¶ 24, 55 P.3d 768, 773-74 (2002). *Northwest Fire District v. U.S. Home of Arizona Construction Co.*, 2 CA-CV 2006-0061, 9/29/06.

An Insurance Company May Be Required to Include the Cost of a General Contractor's Overhead and Profit in Its Actual Cash Value Payment for Property Damage Even When the Homeowner Chooses to Repair the Damaged Property Without Hiring a Contractor. A homeowner policy's "actual cash value" provision concerning property damage includes any reasonable cost that likely would be incurred in the repair or replacement of a covered loss. If the cost to repair or replace the damaged property would likely require the services of a general contractor, the contractor's overhead and profit fees should be included in determining actual cash value. This is true, even when an insured ultimately elects to personally complete the repairs. *Tritschler v. Allstate Ins. Co., Better Way Services*, 2 CA-CV 05-0136, 10/13/06.

SUPREME COURT PETITIONS

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The Arizona Supreme Court accepted review or jurisdiction of the following issues on Oct. 23, 2006*:

Deer Valley Unified School District v. Maricopa County Superior Court and Hon. Robert Houser and Pamela McDonald, 1 CA-SA 06-0143, CV-06-0275-PR (Order)
Issue Presented
"When a Notice of claim requires a public entity to calculate a settlement amount using components of "approximately $35,000.00 or more going forward over the next 18 years" plus account for "similar appropriate pay increases thereafter," does the notice include "a *specific amount for which the claim can be settled*"; and is a mere "no less than $300,000.00" for "emotional distress" and "no less than $200,000" for "damage to the [plaintiff's] reputation" a sufficient statement of *"facts supporting that amount" and "a specific amount"* to meet the requirements of A.R.S. § 12-821.01 (1994)?"

State of Arizona ex rel. The Department of Economic Security (Denise L. Tacktor) v. Daniel W. Graham, 1 CA-CV 05-0156, CV 06-0158-PR (Mem. Decision)
Issue Presented
"Whether the trial court abused its discretion in setting aside the judgment for child support arrearages."

In the Matter of a Non-Member of the State Bar of Arizona: Carly R. Van Dox, Disc. Comm. No. 04-1846, SB-06-0121-D
Issues Presented for Review
A. Whether the Hearing Officer and the Disciplinary Commission lack subject matter jurisdiction over unauthorized practice of law proceedings pursuant to Supreme Court Rules 75 through 80, effective July 1, 2003, an issue on which the Disciplinary Commission was sharply divided 5–4;
B. Whether the Disciplinary Commission clearly erred in finding that Respondent acted "knowingly" and, therefore, committed legal error in applying Standard 7.2 and censuring Respondent;
C. Whether a respondent attorney admitted to practice law in another jurisdiction, and over whom this Court has jurisdiction to impose attorney discipline, is ineligible for diversion because the Respondent is not a member of the Arizona Bar;
D. Whether requiring a qualified mediator to take the Arizona bar as a condition of engaging in mediation violates the mediator's right to equal protection and due process, and whether denying diversion to a respondent attorney because that attorney is not a member of the Arizona bar violates the attorney's right to travel.

David Garcia v. Hon. Christopher Browning, Respondent, and State, Real Party in Interest, 2 CA-SA 06-0040, CV-06-0320-PR (Opinion)
Issues Presented
None stated separately by the State. The issue is whether the Court of Appeals erred in holding that the amended version of A.R.S. § 13-205, Arizona's statute on affirmative defenses, enacted as an emergency measure and effective on April 24, 2006, applies to criminal defendants such as Garcia who allegedly committed a crime before the effective date of the statute but whose trial will occur after that date.

**Unless otherwise noted, the issues are taken verbatim from either the petition for review or the certified question.*

COURT OF APPEALS CRIMINAL MATTERS

A trial court does not commit reversible error by accepting a guilty verdict bearing the handwritten notation of the jury foreman's juror number (rather than the juror's written name) on the signature line for the jury foreperson. Under Rule 23.1(a), ARIZ.R.CRIM.P., "The verdict of the jury shall be in writing, signed by the foreman, and returned to the judge in open court." Although the usual meaning of the word "sign" connotes a written signature, in applying the principles of construction the term "sign" (as defined by BLACK'S LAW DICTIONARY) means any mark used which evidences authentication of the verdict by the jury foreperson. Moreover, the actual jury polling procedures defined in Rule 23.4, ARIZ.R.CRIM.P., support the conclusion that the Arizona Supreme Court did not intend to restrict the manner of "signature" referenced in Rule 23.1 to a "name" because in recently amending Rule 23.4 it specifically designated that "the judge and clerk shall not identify the individual jurors by name, but shall use such other methods or form of identification as may be appropriate to ensure an accurate record of the poll and to accommodate the juror's privacy. *State v. McIntosh*, 1 CA-CR 05-0753, 11/9/06.

A trial court does not err in failing to order a *Dessureault* hearing or give a *Dessureault* instruction when the defense motion is untimely and there is no merit to the allegation that the identification procedure used by police in showing the victim the defendant's identification card left in his abandoned vehicle shortly after the crime was unduly suggestive or that it tainted the in-court identification because the victim had previously given a highly consistent description of the defendant to police after having the opportunity to see the defendant in his vehicle prior to its commission. Rule 16.1(c), ARIZ.R.CRIM.P., provides that any motion "not timely raised … shall be precluded" unless the party did not or could not through reasonable diligence have known the basis for the motion, and the motion was made promptly upon learning its basis. A trial court must instruct the jury on a requested lesser-included offense if the evidence supports such an instruction and the lesser offense is either always a constituent part of the greater offense or the charging document actually describes the lesser offense though not always a constituent part of the greater offense. **A trial court does not commit *Blakely* error in aggravating a defendant's sentence based upon factual conclusions or information on the record derived from their prior convictions and having significance to their present offenses** such as making a determination that a defendant is a danger to the community. *State v. Price*, 1 CA-CR 04-0508, 10/31/06.

A court is not obliged to impose less than a presumptive sentence when it finds only mitigating factors and no aggravators at the time of sentencing because a trial court is not required to make decision based upon the mere numbers of aggravating or mitigating circumstances, and because A.R.S. § 13-702 specifically requires that when a sentencing court finds mitigation it must determine "whether the amount of mitigating circumstances is sufficiently substantial to call for the lesser term." *State v. Olmstead*, 1 CA-CR 05-1240, 10/26/06.

Under the "rescue doctrine" or "private safety exception" to *Miranda* **a trial court does not err in failing to suppress un-*Mirandized yet voluntary* statements made by a defendant during custodial interrogation regarding their perceived medical distress caused by swallowing drug evidence necessitating emergency medical treatment** under circumstances obviously threatening the defendant's life. In such cases courts apply the following three-prong test asking whether there exists: (1) an urgent need, and no other course of action promises relief; (2) the possibility of saving a human life by rescuing a person in danger; and (3) rescue is the primary purpose and motive of the interrogator. *State v. Londo*, 1 CA-CR 05-1190 & CA-CR 05-1191 (Consol.), 10/26/06.

COURT OF APPEALS INDUSTRIAL COMMISSION MATTERS

Parties May Be Joined in Timely Filed Workers' Compensation Case After Limitations Period Has Run. Arizona Administrative Code R20-5-150 allows joinder of a party "over whom the [Industrial] Commission may acquire jurisdiction." The Industrial Commission

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The Arizona Supreme Court and Arizona Court of Appeals maintain Web sites that are updated continually. Readers may visit the sites for the Supreme Court (www.supreme.state.az.us/opin), the Court of Appeals, Div. 1 (www.cofad1.state.az.us) and Div. 2 (www.apltwo.ct.state.az.us).
Detailed summaries of selected cases and other court news may be found at **www.azapp.com**

may properly exercise jurisdiction over additional parties after the limitations period in A.R.S. § 23-1061(A) has run if the initial claim was timely filed. *Western Water Works v. Industrial Commission of Arizona*, IC 05-0133, 10/17/06.

A Petition for Special Action Mistakenly Filed With the Industrial Commission of Arizona Is Deemed Timely Filed With the Court of Appeals. Pursuant to A.R.S. § 12-120.00.B and ARIZ.R.CIV.APP. 4(a), a petition mistakenly but timely filed in division two or the supreme court will be transferred to division one and deemed timely filed. Although both the statute and the rule refer to an appeal filed in the incorrect "court or division," because the Industrial Commission of Arizona ("ICA") functions as a quasi-judicial body, Rule 4(a) should similarly be applied to petitions filed with the ICA. Thus, a petition timely but mistakenly filed with the ICA must be transmitted to division one where it will be deemed timely filed. *Martinez v. The Industrial Commission of Arizona*, IC 05-0141, 10/26/06.

COURT OF APPEALS SPECIAL ACTION MATTERS (CIVIL)

Work Product Protection of Expert's File Was Restored By Withdrawing Witness Designation, Even After Expert Testified About Preliminary Matters. Although the scope of discovery is expansive for expert witnesses, ARIZ.R.CIV.P. 26(b)(4) "distinguishes sharply between testimonial and consulting experts." Pursuant to that rule, discovery from consulting experts is prohibited except "upon a showing of exceptional circumstances." The majority approach is that when a party changes its expert's designation from "testifying expert" to "non-testifying" expert under Rule 26(b)(4), discovery by the other party is limited to the restriction set forth for non-testifying experts. This remains true even where the expert has testified at a pretrial proceeding on issues subsequently resolved by stipulation. However, this may not be true if the subjects of the pretrial testimony are not readily segregated from the trial issues. *Green v. Green*, 2 CA-SA 06-0062, 9/28/06.

The Civil Rules of Procedure and Ethical Rule 4.2 Apply to a Sexually Violent Person's Post-Commitment Proceedings. The Arizona Rules of Civil Procedure and Ethical Rule 4.2, rather than criminal procedural rules, govern deposition and interview proceedings undertaken in connection with post-commitment proceedings for a sexually violent person. A.R.S. § 36-3704(B) expressly provides that the civil rules apply, and Arizona Department of Health Services, Arizona State Hospital and the Arizona Community Protection and Treatment Center employees are agents/employees of the State. However, given its discretion to order and control discovery, a trial court may be able to implement other procedures that differ from the rules of civil procedure. *State v. Gottsfield*, 1 CA-SA 06-0106, 10/24/06.

* indicates a dissent